

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

ASARCO LLC,

Plaintiff,

v.

NL INDUSTRIES, INC., *et al.*,

Defendants.

Case No.: 4:11-cv-00864 JAR

**PLAINTIFF'S MARCH 11, 2015 STATUS REPORT  
ON GOVERNMENT REMEDIATION**

In anticipation of the Court's forthcoming ruling on ASARCO LLC's ("Asarco") *prima facie* showing as to Defendant Union Pacific Railroad ("Union Pacific") and concomitant case management order, Asarco provides this status report regarding remediation of the Southeast Missouri Mining District ("SEMO" or "SEMO Sites")<sup>1</sup> in connection with its Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") contribution action.<sup>2</sup>

**I. PROCEDURAL STATUS**

In its Memorandum and Order denying Defendants' Motions for Stay (Dkt. 141), the Court explained that it would deny the stay and instead enter a "Lone Pine" modified case

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<sup>1</sup> SEMO is comprised of five sub-sites: (a) Madison County / Catherine Mine ("Madison County"); (b) Big River / Federal Mine Tailings / St. Joe. Minerals Corporation ("St. Francois County"); (c) West Fork Mine; (d) Sweetwater Mine; and (e) Glover Smelter.

<sup>2</sup> When the Court denied Defendants' motion to stay this action and entered an order phasing discovery, it ordered the submission of biannual status reports in order to understand the status of the ongoing remediation at SEMO. *See* Dkt. No. 141.

management order to “keep this case moving forward in a meaningful way without imposing an undue burden on defendants.” (Dkt. 141 at 6-7.) The Court’s Modified Case Management Order limited discovery, in Phase I, to Asarco’s *prima facie* liability showing as to each defendant. (Dkt. No. 147 at 2.) Full discovery and pre-trial procedures will commence after Asarco establishes *prima facie* liability. (*See id.* at 2.)

Asarco made its *Lone Pine* showing as to Defendants St. Francois County Environmental Corporation (“SFCEC”), Anschutz Mining Corporation (“Anschutz”) and NL Industries, Inc. (“NL”) through Defendants’ own stipulation. SFCEC stipulated, among other things, that it was a covered person under CERCLA within the St. Francois County subsite (also known as the Big River Mine Tailings Superfund Site). (Dkt. 190 at 2.) NL similarly stipulated that it was a covered person under CERCLA within both the St. Francois and Madison County subsites at issue in this litigation. (Dkt. 192 at 1.) Anschutz also stipulated that it was a covered person under CERCLA at the Madison County subsite. (Dkt. 193 at 1.) In December 2013, the Court entered orders that Asarco’s *Lone Pine* showing required for Phase I was satisfied as to these defendants. (Dkt. 191, 194, 195.)

Union Pacific was the sole defendant who refused to stipulate to Asarco’s *prima facie* showing. Union Pacific is a current and former owner and operator of rail lines constructed with mining waste that transverse the SEMO Sites. (*See* Dkt. No. 214 at 16-22.) Despite its extensive operations and admission of liability at other Superfund sites for its rail lines (*see, e.g.,* Consent Decree in *United States v Union Pacific R.R., et al*, Case No. CV 95-0152-N-HLR (D. Idaho Sept. 12, 1995)), Union Pacific refused to stipulate to a *prima facie* showing at either of the SEMO subsites at issue in this litigation. Accordingly, the parties engaged in extensive briefing and oral argument. It has now been six months since Asarco’s *Lone Pine* showing and Union

Pacific's motion for summary judgment were argued before this Court. (Dkt. 277, 288 at 1.)

The Court acknowledged that the record was complete for ruling on Union Pacific's motion for summary judgment in its December 10, 2014 Memorandum and Order. (Dkt. 300 at 5.) Based on that order and the full and extensive briefing on the *Lone Pine* and summary judgment issues, the parties expect rulings to be issued by the Court shortly, including a new modified case management order governing the next phase of discovery on allocation and damages. Asarco provides the following status report, which highlights the substantial progress to date by United States Environmental Protection Agency ("EPA"), in preparation of the Court's forthcoming case management order.

## **II. REMEDIATION UPDATE**

Asarco is only pursuing contribution claims in St. Francois and Madison Counties, and costs in other counties will not be pursued. Transcript of Hearing, *Asarco LLC v. NL Indus., Inc.*, No. 4:11cv864 at 4-5 (E.D. Mo. Sept. 12, 2014). As such, the following status report provides an update only as to the remediation processes at St. Francois and Madison Counties. As this status report and the previous status reports indicate, these processes are straight-forward, underway and mostly complete, with the costs either finite or easily calculated based upon previous spent costs or with the assistance of expert testimony.

### **A. *Cleanup of Madison County***

The Madison County subsite is located approximately 90 miles south of St. Louis, Missouri in an area of southeast Missouri known as the "Old Lead Belt" and includes all of Madison County and the "Mine LaMotte Tract" in southern St. Francois County. The cleanup at Madison County has been ongoing for well over ten years and is near completion. Defendants NL, Anschutz, and Union Pacific operated extensively in Madison County, but have not paid

their fair share of cleanup costs.

As referenced above, both NL and Anschutz stipulated to Asarco's *prima facie* showing under CERCLA and that they are covered persons under CERCLA at this subsite. Both NL and Anschutz operated at the Madison County Mine, and they should likewise contribute to clean-up the watershed and residential soil throughout the County. NL should further contribute its share for cleanup at Mine LaMotte and for other tailings piles created by its operations. Defendant Union Pacific operated throughout the entire County and used railways constructed of mining waste, causing extensive natural resource damages. Union Pacific should pay its share of damages that its rights-of-way caused to the County and its natural resources.

Since Asarco's last status update, substantial progress has been made. Notably, the EPA published its Record of Decision for the Madison-Wide Residential Operable Unit 03 ("OU3"). As of October 31, 2014, the sampling work at OU3 was more than 85% complete.

As of December 2014, the EPA was preparing for the procurement process to award a contract that would jointly address the construction need to complete remediation of the remaining residential properties (OU3) and the Conrad Tailings ("OU4"). Once remedial action is initiated, the OU3 and OU4 response actions would begin simultaneously. In addition, EPA published the final basis of design and the final remedial design for Catherine Mines and Skaggs Tailings Subsites Operable Unit 05 ("OU5"). Construction on OU5 should be complete by September 2015.

Asarco paid a total of approximately \$14.3 million in Madison County consisting of \$12.7 million for response costs and \$1.6 million for natural resource damages, despite the fact that Asarco's operations in Madison County were minimal and only limited to the Catherine Mine. Given the substantial progress at the Madison County Superfund site and the parties'

stipulation to Asarco's *prima facie* showing, the time is ripe for an amended case management order on allocation and damages.

***B. Cleanup of St. Francois County***

The St. Francois County subsite is located 7 miles south of St. Louis and is comprised of seven large areas of mine waste, approximately 110 square miles in size. The clean-up generally consists of four areas: tailings piles, residential remediation, natural resource damages ("NRD") and watershed. The Site includes any area where hazardous wastes are located. *See* Record of Decision, Big River Mine Tailings Superfund Site, St. Francois County, Missouri, CERCLIS ID#: MOD981126899, Operable Unit – 1, Appendix C, Responsiveness Summary at 19-20 ("facility includes 'any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . .' 42 U.S.C. § 9601(9)."). The EPA confirmed this definition of the Site.

NL and Union Pacific both had extensive operations throughout the County. SFCEC instituted a landfill in the middle of a tailings pile, after which a massive tailings slide occurred in 1977, causing substantial damages to the neighboring communities and watersheds. Asarco already established the *prima facie* liability of all three defendants either through stipulation and court-order, as with NL and SFCEC, or through the substantial evidence and briefing Asarco submitted last summer on Union Pacific. All three of these Defendants should pay their respective contribution for the tens of millions of dollars in remediation that Asarco paid on their behalf.

EPA has made significant strides at this Superfund subsite since the last update. For OU 00, nearly all of the tailings piles have been stabilized for a number of years, including the Big River Pile (Desloge), the Bonne Terre Pile, and the Leadwood Pile. As for the Leadwood Pile,

EPA also completed a 30-acre cap. Additional capping has been completed at the Federal Mines source pile.

On September 30, 2014, EPA awarded a multi-million dollar contract to perform remediation cleanup of lead contaminated residential yards in Big River for OU 1. Over a 2-year period of time, roughly 250 to 300 residential properties (100,000 tons of soils) will be addressed. The work on these time critical properties should be completed by September 30, 2016. The progress on the cleanup of residential properties is also reflected in OU 3. Under the HALO program instituted under OU 3, when elevated blood lead levels are detected in children, EPA samples their residences as well. There have been no reported cases of elevated blood lead levels since the last update. The feasibility study for OU 2 (off-source areas, railroads, and Flat River Creek) is on track for September 2015 completion. EPA is currently doing a pilot study on the Big River watershed.

In addition to the remedial actions being completed, there has been substantial progress in natural resource damages. As of August 4, 2014, the Trustees for the National Resource Damage Assessment and Restoration in Missouri developed and released a Final Southeast Missouri Ozarks Regional Restoration Plan to address natural resources injured by the release of hazardous substances. The Trustee Council initiated the development of this plan for Natural Resource Damage Assessment cases occurring in the Southeast Missouri Lead Mining District. The trustees will begin expending the natural resources damages recovered and are considering several large acquisitions on behalf of the State of Missouri as well as extensive riparian corridor restoration projects. As of October 1, 2014, the Missouri Ecological Services and Wildlife Conservation offices completed a field study to determine how freshwater mussel populations might be affected by contaminated sediments in the Big River.

Both response actions and natural resource damages in St. Francois County are nearly complete. Asarco paid \$24.8 million for response costs and \$29.5 million for natural resource damages to fund these activities. Since NL and SFCEC already stipulated to Asarco's *prima facie* showing of liability in this county and Asarco established Union Pacific's liability for both St. Francois and Madison counties, Asarco is entitled to proceed with full discovery on allocation and damages for St. Francois County.

### **III. A STAY IS STILL NOT APPROPRIATE IN THIS ACTION.**

On March 11, 2015, Defendants filed a status report on the sites and claimed that a district court's stay order in a Missouri contribution case, *ASARCO, LLC v. NL Industries, Inc.*, No. 4:11-cv-00138 (W.D. Mo.), means that a similar stay is appropriate in this case. (Dkt. 305 at 4-5). This claim is belied by their own status report, which informs the Court of EPA's substantial remediation progress. (Dkt. 305 at 2-4.) Defendants fail to mention that this Court denied Defendants request for a complete stay of this case (Dkt. 141 at 7) and again denied its request upon reconsideration (*see* Dkt. 147 at 2.) Defendants have not provided sufficient justification to revisit this issue for a third time. The partial stay in this case was only granted by this Court so that it can "assess the merits of Asarco's claims." (Dkt. 147 at 2.) Whether Asarco met its *Lone Pine* showing as to Union Pacific was briefed and heard. The parties are only waiting for the Court's ruling on *Lone Pine* for this case to continue.

Furthermore, in the Missouri contribution case, the district court certified its own stay order for appeal because it found, among other things, that an indefinite stay involved a controlling question of law, and a substantial difference of opinion existed regarding the law. Order, *NL Indus.*, No. 4:11-cv-00138 at 5-9 (W.D. Mo. Jan. 22, 2015). The district court found that there was a difference of opinion among courts regarding whether cases "can proceed

absent full determination of the remedial activities and the costs for cleanup and [Natural Resource Damages].” *Id.* at 6. The Eighth Circuit did not affirm the district court’s stay order but merely denied Asarco’s petition for permission to appeal without comment. Judgment, *Asarco LLC v. NL Indus.*, No. 15-8001 (8th Cir. March 2, 2015). As recognized by Defendants, an order by another court in an unrelated matter is an “ancillary” issue and not grounds for implementation of a stay, particularly in light of EPA’s progress at SEMO and Defendants’ own stipulations to their *prima facie* liability.

#### IV. CONCLUSION

In weighing the burdens on Asarco, a party who came forward and paid tens of millions of dollars four years ago, and those of the four defendants, parties who contested Asarco’s ability to even establish a *prima facie* showing, the Court entered a modified case management order until such time as Asarco established a *prima facie* showing to Defendants’ liability. Such time is now; Asarco established Defendants’ *prima facie* liability either through stipulation or its May 2014 briefings. In addition, in the four years since this case was filed, EPA made significant progress, and the Court can readily estimate the response cost for these counties as the remedial actions are nearly complete. This case is ready to proceed to the allocation and damages phase.

Dated: March 11, 2015

Respectfully submitted,

By /s/ Gregory Evans

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**ATTORNEYS FOR ASARCO LLC**

**CERTIFICATE OF SERVICE**

I certify that counsel of record who are deemed to have consented to electronic service are being served on March 11, 2015 with a copy of this document via the Court's CM/ECF system.

/s/ Gregory Evans